


DATE: July 7, 1997

TO: Task Force C, Working Group On
Definition of Unitary Business

FROM: John S. Warren 

RE: The Definition/Test(s) of Unitary Business

Attached is my redraft of the proposed regulation on the Definition of a Unitary Business, with deletions ~~struck out~~ and additions in ***bold italics***. My major change is in III.C., D. and E. regarding the tests of a unitary business. I have also made alternative changes in IV.A. regarding evidence and presumptions, even though the primary assignment of this subject was to Task Force B. There are some miscellaneous changes which if not self-evident will be explained in our teleconference.

My objective regarding the tests of a unitary business is to downgrade the three unities and contribution/dependency tests and play up what the current draft calls the *Mobil* Factors Test. I do acknowledge that the venerable cases which recited the first two tests are still good authority, so as not to upset the states which have a statutory definition which recites one or both of those tests.

I have changed the title of "*Mobil* Factors Test" to "Basic Test." I don't think it should be so closely identified with the *Mobil* case where in fact the issue of unitary business was not litigated. I have changed "factor" to "element" wherever it appears so as not to cause confusion with that term as used in the statute (*e.g.*, property factor, payroll factor, sales factor).

With regard to "IV. Evidence and Presumptions," I can see three alternatives. The first alternative is incorporated in my complete redraft. It makes four changes in the current draft:

1. It allows the presumptions to be invoked by, rather than only against, the taxpayer. The second sentence of paragraph A. regarding rebuttal is no longer taxpayer-specific.

2. It gives the presumptions equal strength by substituting "presumed to be" for "generally engaged in" in subparagraph 1., for "almost always" in subparagraph 2., and for "properly consider as" in subparagraph 4. (now 3.).

3. It deletes subparagraph 3., the presumption that business segments within a single business entity are unitary. This presumption is in direct conflict with II.D. and III.B. which state the sounder principal. (For the same reason I have deleted subparagraph iv. under III.E.3.b.).

4. The last sentence under subparagraph 4. (now 3.) is deleted. This sentence seems to undermine the whole subparagraph, and I don't know what the drafter had in mind.

My second alternative is set forth in separate pages of my redraft. It denotes the presumptions to "*indicia*," which is more like what they are in the existing regulation. In paragraph A. the rebuttal sentence is deleted as unnecessary, but I have added the last sentence from old subparagraph 4. It somehow seems more appropriate here.

My third alternative would be to delete all of IV.A. and its subparagraphs. Same type of business and steps in a vertical process have already been covered in III.E.5.b.iii., and centralized management is covered both in III.E.5.b. and in III.E.5.c. Deleting the section on presumptions also has the virtue of avoiding an argument on whether presumptions should work both ways.